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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

BORDER BUSINESS PARK, INC.,

Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,

Defendant and Respondent.

E046940

(Super.Ct.No. 692794)

OPINION

APPEAL from the Superior Court of San Diego County. Linda B. Quinn, Judge.  
Reversed.

Niddrie, Fish & Buchanan, Michael H. Fish; Thorsnes, Bartolotta & McGuire,  
Vincent J. Bartolotta, Jr.; Wasserman, Comden & Casselman, David B. Casselman; Ward  
& Ward and Alexandra S. Ward for Plaintiff and Appellant.

Office of the City Attorney, Andrew Jones; Latham & Watkins, Kristine L.  
Wilkes, Katherine Mayer, Michael Pulos and Patricia Guerrero for Defendant and  
Respondent.

Plaintiff Border Business Park, Inc. (hereafter Border) appeals a judgment entered after the trial court sustained the City of San Diego's (hereafter the City) demurrer to Border's third amended complaint, without leave to amend. We conclude that the third amended complaint does state a cause of action. Accordingly, we will reverse the judgment.

### HISTORY<sup>1</sup>

In 1995, Border, formerly known as De La Fuente Business Park, Inc., sued the City for breach of a development agreement pertaining to Border Business Park, a property it owned in Otay Mesa, and for inverse condemnation. The inverse condemnation claim was based on the City's conduct with regard to its plans to relocate San Diego's international airport to Otay Mesa and on its rerouting of truck traffic in a way which allegedly interfered with access to the business park. (*Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538 [Fourth Dist., Div. Two] (*Border v. San Diego*).) The City cross-complained for default on a promissory note, for breach of the development agreement and for unfair business practices.<sup>2</sup>

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<sup>1</sup> This case is one of a trio of cases now before this court arising out of alleged breaches of the development agreement. Border and the plaintiffs in the two companion cases—*National Enterprises, Inc. v. City of San Diego*, E046937, and *Otay Acquisitions LLC v. City of San Diego*, E046939—jointly filed a motion to consolidate the appeals. Although the three cases present similar issues, there are significant differences among them which render it impractical to consolidate them. For that reason, we deny the motion for consolidation.

<sup>2</sup> As we discuss below, our opinion in *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, contains little or no reference to the cross-complaint because no issue was raised as to it. We take judicial notice of the original judgment in that case, a

[footnote continued on next page]

The trial court ruled that the City's actions concerning the airport development plan and the rerouting of truck traffic constituted inverse condemnation. The issue of damages for inverse condemnation was submitted to a jury, as was Border's claim for breach of contract and the City's cross-complaint.<sup>3</sup> The jury found in favor of Border on the City's cross-complaint and awarded Border approximately \$29 million for breach of contract and \$65 million for inverse condemnation. (*Border v. San Diego, supra*, 142 Cal.App.4th at p. 1546.) The trial court later denied the City's motion for judgment notwithstanding the verdict and partially granted the City's motion for a new trial on the breach of contract cause of action, holding that some of the breaches of the agreement Border had presented to the jury had occurred more than one year prior to June 23, 1995, the date on which Border submitted its claim to the City. The Government Claims Act<sup>4</sup> (Gov. Code, § 900 et seq.) limits recovery for breach of contract to damages resulting

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[footnote continued from previous page]

certified copy of which appears in the record on appeal, which reflects the causes of action stated in the City's cross-complaint. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

<sup>3</sup> In a claim for inverse condemnation, the court determines whether the public entity's actions constitute inverse condemnation and the jury determines damages. (*Border v. San Diego, supra*, 142 Cal.App.4th at p. 1546, fn. 6.)

<sup>4</sup> The informal short title of this act is the "Tort Claims Act." However, because the act applies to claims for breach of contract as well as to tort claims, the California Supreme Court has elected to refer to it as the "Government Claims Act." (*City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 734.) We do likewise. We also refer to it sometimes simply as "the Act" or "the claims act."

All further statutory citations refer to the Government Code unless another code is specified.

from breaches which occurred within one year prior to presentation of a claim. (*Border v. San Diego, supra*, 142 Cal.App.4th at p. 1562, fn. 20.)

The City appealed the inverse condemnation judgment, and Border appealed the order granting the City a new trial on Border's breach of contract claim. (*Border v. San Diego, supra*, 142 Cal.App.4th at pp. 1543-1544, 1546.) We reversed the judgment for inverse condemnation, holding that the evidence was insufficient as a matter of law both as to the airport inverse condemnation cause of action and as to the easement of access cause of action. (*Id.* at pp. 1546-1551, 1551-1560.) We affirmed the trial court's order for a new trial on Border's breach of contract claim. (*Id.* at p. 1567.)

Upon remand, the City filed a motion for judgment on the pleadings, referring to Border's second amended complaint. In its motion, the City argued that Border's Government Code claim failed to comply with section 910, which requires, among other things, that the claimant state the date of the "occurrence or transaction" giving rise to the claim. (§ 910, subd. (c).)

The trial court granted the motion, finding that Border's claim failed to state the date of the occurrence. It held that strict compliance is required. However, it allowed Border to amend its complaint to allege that by rejecting the claim prematurely,<sup>5</sup> the City

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<sup>5</sup> Section 910.8 provides that if the recipient of a claim determines that it fails to comply with the Act's requirements in certain respects, it may, within 20 days after the claim was presented, give written notice of the insufficiency. The recipient may not take any action on the claim for a period of 15 days thereafter.

had waived any defense based on any date defect in Border's Government Code claim, as Border had contended in its opposition to the motion.<sup>6</sup>

Border timely filed a third amended complaint. It alleged that it complied with the claims presentation requirements as follows: After the City notified it that its Government Code claim was deficient because it failed to state the date of the occurrence, Border's attorney, Christopher Denny, met with the City's representatives to discuss the alleged insufficiency of the claim and possible settlement of the claim. It alleged that at the meeting, which took place on July 19, 1995, the issue of the "date of incident" was discussed. Border's representative, Roque De La Fuente, "explained that the breaches by the City were ongoing, but to satisfy the City's request for a specific 'date of incident,' wrote January 1, 1995[,] on the claim form and gave it to the City during that meeting." The complaint alleged that "all present" were satisfied by this additional information and that the City never thereafter suggested that anything else remained for Border to do in order to fully comply with the Government Claims Act. Border attached a copy of a letter from the City referencing the meeting and confirming some of the items discussed.

The complaint further alleged that the City used the January 1, 1995, date of incident when it later denied the claim. A copy of the City's rejection of the claim was

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<sup>6</sup> In its opposition to the motion, Border asserted numerous theories of waiver, estoppel, laches and abandonment with respect to the City's contention that the Government Code claim was defective for failure to state a date of breach. For convenience, we will sometimes refer to those theories collectively as the waiver theories.

attached to the complaint, as was a copy of a letter from Chief Deputy City Attorney Harold O. Valderhaug to Roque De La Fuente, which confirmed that the meeting had taken place and discussed a number of the issues that had been raised during the meeting. The complaint alleged that the City accepted the January 1, 1995, date of occurrence and concluded “that the claim was then sufficient and could be evaluated on [its] merits,” as evidenced by its denial of the claim on its merits without reference to any insufficiency in the form or content of the claim. It alleged that by doing so, the City intentionally waived any contention that the claim was deficient for failure to state a date of occurrence. It alleged further that although the City could have raised the insufficiency of the claim as a defense at trial, it did not do so and thus waived the defense. In the alternative, the complaint alleged that the City waived any defect in the claim by virtue of its premature denial of the claim, in violation of sections 910.8, 915.2 and 915.4.

The City demurred. It contended that the allegation that Border amended the Government Code claim exceeded the scope of the trial court’s order permitting amendment of the complaint. It also contended that allegations pertaining to waiver, other than the single basis for waiver authorized by the trial court, i.e., the City’s premature denial of the claim, also exceeded the scope of the order. It argued as well that even considering the impermissible new allegations, the complaint failed to state a cause of action because Border’s original claim did not state the date of the occurrence and the purported amended claim did not comply with the claims presentation and delivery requirements of the Government Claims Act. The City also contended that the purported

amended claim—i.e., the original claim with the date “January 1, 1995” inscribed on it—was itself deficient because merely stating a date on which an alleged ongoing series of breaches of the contract began did not satisfy the requirements of the Government Claims Act. It also argued that Border’s new theory that it complied with the Government Claims Act by amending the complaint at the meeting with the City was not supported by, or was contradicted by, the documents Border attached to the third amended complaint and/or by other “judicial admissions” that the breaches of the agreement did not begin as early as January 1, 1995.

The trial court sustained the demurrer without leave to amend, stating that Border had failed to amend the complaint in accordance with the court’s previous order granting leave to amend, i.e., to allege only that the City was precluded from asserting the date of occurrence deficiency in Border’s Government Code claim because the City prematurely denied the claim in violation of section 910.8. The court also held that despite its premature denial of the claim, the City nevertheless substantially complied with the Act because the City did not deny the claim until after the July 19, 1995, meeting at which Border presented the amended claim which allegedly cured the deficiency in the original claim. The court concluded that the purpose of prohibiting action on a Government Code claim for 15 days after issuance of a notice of insufficiency is to permit the claimant to amend the claim if necessary, and that since Border had been able to amend its claim, the premature denial did not result in any prejudice.

The court entered judgment in favor of the City on September 4, 2008. On September 12, 2008, it awarded the City \$4,365,869.93 in attorney fees.

Border filed a timely notice of appeal. The cause was later transferred to this court.

### LEGAL ANALYSIS

#### THE REMAND ORDER DID NOT PRECLUDE THE CITY’S ATTACK ON THE PLEADINGS TO ASSERT THAT BORDER FAILED TO COMPLY WITH THE GOVERNMENT CLAIMS ACT

On remand, a trial court’s jurisdiction is limited by the terms of the remittitur. (*Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1529.) In *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, we affirmed the order granting the City’s motion for a new trial on the breach of contract cause of action. (*Id.* at p. 1567.) We gave no explicit direction to the trial court, but implicit in the affirmance is a direction that the breach of contract action be retried in accordance with the order of the trial court. We requested supplemental briefing to address the following question: “Did this court’s affirmance of the new trial order [in *Border v. San Diego*] limit the trial court’s jurisdiction to conducting a trial in accordance with the new trial order and preclude it from taking any other action, or was the trial court at liberty to entertain the city’s motion for judgment on the pleadings as to the second amended complaint and its demurrer to the third amended

complaint?”<sup>7</sup> Having reviewed the parties’ submissions, we conclude that the terms of the order granting the motion for new trial did not preclude pretrial motions raising the defense of lack of compliance with the Government Claims Act.

The general rule is that an unqualified reversal and remand for a new trial places the case once again “at large.” (*Guzman v. Superior Court* (1993) 19 Cal.App.4th 705, 707-708.) The parties are returned to their positions as though the case had never been tried or the original judgment entered. (*Estate of Horman* (1971) 5 Cal.3d 62, 72-73.) Here, we did not reverse the judgment but affirmed the trial court order for a new trial. However, the effect is the same. (*Guzman*, at p. 708; *Saakyan v. Modern Auto, Inc.* (2002) 103 Cal.App.4th 383, 390, fn. 8.) Thus, if the trial court’s order for new trial was “unqualified,” our remittitur, which was also unqualified, placed the case at large, as though no prior trial had been held.

The trial court ordered a new trial on both liability and damages for breach of the development agreement, subject only to the direction that the new trial would be limited to claims for damages arising from breaches of the development agreement which occurred between June 23, 1994, and June 23, 1995, the date Border presented its

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<sup>7</sup> This question was in part suggested by Border’s assertion that the City waived any “date defect” defense on remand by virtue of its failure to assert it prior to or during the trial. As we discuss elsewhere, Border has forfeited the ability to assert all but one of its waiver theories in this appeal, as well as its related theories of abandonment, laches and estoppel. Nevertheless, our discussion in this section demonstrates that Border’s theories of waiver by abandonment or by what it terms “litigation delay” are without merit.

Government Code claim.<sup>8</sup> Because the new trial order expressly provided that issues of both liability and damages for any such breaches must be retried, on remand the breach of contract cause of action was at large, subject only to the time limitation contained in the trial court's ruling.<sup>9</sup>

Border contends, however, that the order for a new trial must be viewed as an order for trial only, and not as authorization for a new attack on the pleadings. We disagree. On remand for a new trial, the defendant may raise defenses it failed to raise in the first trial, even defenses it abandoned prior to the first trial. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1112-1113; see also *Estate of Horman, supra*, 5 Cal.3d at pp. 72-73 [previously unasserted statute of limitations defense may be raised on remand for new trial in the discretion of the trial court].) Moreover, failure to state a

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<sup>8</sup> The full text of the trial court's ruling appears below, in our discussion of the City's contention that Border's breach of contract claim is entirely time-barred.

<sup>9</sup> Border contends that the trial court did not place an end limit, i.e., June 23, 1995, on the claims for breach of the agreement which Border could pursue. We agree that it did not do so expressly. However, as we discuss in detail in the companion cases, *National Enterprises, Inc. v. City of San Diego*, E046937, and *Otay Acquisitions LLC v. City of San Diego*, E046939, it is established law that a claimant may not pursue a claim for damages resulting from a breach of contract which occurred after the date of its Government Code claim. In order to recover such damages, the claimant must file a new claim. The claimant may, however, seek to recover damages which were incurred after the date of the Government Code claim if the damages resulted from a breach which occurred before the Government Code claim was presented and which was factually "fairly reflected" in the Government Code claim. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447; see *Ocean Services Corp. v. Ventura Port Dist.* (1993) 15 Cal.App.4th 1762, 1778; *Bellman v. County of Contra Costa* (1960) 54 Cal.2d 363, 369.) Accordingly, the end date for the occurrence of the breaches for which Border may seek damages is supplied as a matter of law by the trial court's ruling.

cause of action may be raised at any time. (Code. Civ. Proc., § 430.80, subd. (a); *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 831, fn. 18.) Compliance with the claim presentation requirements of the Government Claims Act is an element of a cause of action which is subject to the Act. Failure to allege facts demonstrating or excusing compliance with claim presentation requirements is therefore grounds for a demurrer or for judgment on the pleadings on such a cause of action. (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1237, 1239-1245; see *Cloud v. Northrop Grumman Corp.* (1998) 67 Cal.App.4th 995, 999 [motion for judgment on the pleadings serves same purpose as general demurrer].) Because neither the trial court's order nor our remittitur provided otherwise, the City was entitled to raise this defense on remand. Whether it did so at trial or by demurrer or motion for judgment on the pleadings is immaterial.

Border also contends that the doctrine of law of the case precludes the City from asserting lack of compliance with the claims act because the trial court's ruling on the new trial motion was implicitly based on the premise that a legally sufficient claim had been presented. It also contends that the sufficiency of the claim is implicit in our statement, in *Border v. San Diego, supra*, 142 Cal.App.4th 1538, that "[o]n June 23, 1995, Border presented a Government Code claim to the city." (*Id.* at p. 1562.) However, the sufficiency of the claim was not raised either in the trial court prior to the appeal or in this court in the first appeal. The doctrine of law of the case applies when an appellate court states in its opinion a principle or rule of law which is *necessary* to its

decision. (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) Accordingly, an appellate decision does not, as a general rule, constitute law of the case on any issue which could have been presented and decided in the appeal but was not. (*Estate of Horman, supra*, 5 Cal.3d at p. 73.) Because this court was not asked to consider the sufficiency of the claim, our opinion in *Border v. San Diego, supra*, does not establish that the claim was or was not sufficient. Consequently, the doctrine of law of the case does *not* preclude the City from attacking the pleadings on the ground that Border's Government Code claim was deficient for failure to state a date of occurrence. Border next contends that because Code of Civil Procedure section 656 defines a new trial as a "re-examination of an issue of fact," the trial court's order for a new trial "could only have been for a re-examination of whether Border was entitled to recover for post-June 23, 1994 breaches, not original new attacks on the pleadings." But a reexamination of Border's entitlement to damages does not preclude the City from raising any applicable defense, including defenses the City did not raise in the first trial. (*Gordon v. Nissan Motor Co., Ltd., supra*, 170 Cal.App.4th at pp. 1112-1113.) In *Estate of Horman, supra*, 5 Cal.3d 62, the California Supreme Court held that on remand for a new trial, the trial court had discretion to permit amendment of the pleadings to set up a statute of limitations defense which was not raised in the first trial or appeal. (*Id.* at pp. 72-73.) By parity of reasoning, the trial court may also dispose of a case on remand for a new trial where a previously unasserted defense provides grounds for a demurrer or any other device for adjudication without trial.

Next, Border contends that the City cannot assert the insufficiency of the Government Code claim because the case was originally tried on the assumption that the claim complied with the Government Claims Act. Border is correct that under the “theory of trial doctrine” (9 Witkin, Cal. Procedure, Appeal (5th ed. 2008) § 407, pp. 466-468), a defendant can be estopped to assert on appeal that the complaint failed to state a cause of action, if the matter was tried on the assumption that the complaint did state a cause of action. However, the “most common application of the . . . doctrine is to curable defects of pleadings which were ignored at the trial.” (*Id.*, § 409, p. 468.) Here, the City demurred on the basis of a defect which was not curable, if the City’s contention was correct, i.e., that Border failed to present a claim which complied with the claim presentation requirements. In any event, the issue here is not whether the City could validly raise the pleading defect on appeal; it is whether it could raise it for the first time as a matter of defense on remand for a new trial. As we have discussed above, the City was entitled to do so. (*Estate of Horman, supra*, 5 Cal.3d at pp. 72-73; *Gordon v. Nissan Motor Co., Ltd., supra*, 170 Cal.App.4th at pp. 1112-1113.)

THE THIRD AMENDED COMPLAINT ADEQUATELY ALLEGES COMPLIANCE  
WITH THE GOVERNMENT CLAIMS ACT

On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the reviewing court must independently determine whether the complaint states a cause of action under any legal theory. The court treats the demurrer

as admitting the truth of all material facts properly pleaded. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

Border asserts that the demurrer was improperly sustained for three reasons: because the original claim did state a date as required by the claims act; because the complaint properly alleged that the City waived any contention that Border's Government Code claim was insufficient with respect to the date of occurrence; and because the claim as amended, on either of two theories or both, substantially complied with the claims presentation requirements. As we discuss below, we reject Border's first two contentions. However, we agree that the complaint adequately alleged that the Government Code claim as amended substantially complied with the date requirement stated in section 910.

#### The Sufficiency of the Original Claim

Section 910 requires that the claim state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted" and provide "[a] general description of the . . . injury, damage or loss incurred so far as it may be known at the time of presentation of the claim." (§ 910, subds. (c), (d).) Border contends that its original Government Code claim does state a date of occurrence as required by the claims act. However, that issue is not before us. The trial court determined in its ruling on the City's motion for judgment on the pleadings as to the second amended complaint that the claim did not state a date of occurrence. Border did not seek review of that order, either by writ petition or by allowing the trial court to enter judgment on the second amended

complaint and filing an appeal. Instead, it chose to amend its complaint. By doing so, it waived its right to appeal any ruling made in connection with the motion for judgment on the pleadings. (See *Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 966, fn. 2.) The fact that the City again asserted the defect in its demurrer does not change this; the trial court had already determined that the claim was deficient in that respect and it did not address the contention again in sustaining the demurrer, nor did it need to do so. In any event, the trial court was correct that the claim does not state any date of occurrence.

The original claim also does not substantially comply with the date requirement. The purpose of the claim presentation requirement is to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without litigation. (*City of Stockton v. Superior Court*, *supra*, 42 Cal.4th at p. 738.) Because the purpose of the claim is merely to give the public entity notice sufficient to allow it to investigate and evaluate the claim, strict compliance with section 910 is not required. Rather, as long as the policies of the claims statutes are effectuated, substantial compliance is all that is required. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority*, *supra*, 34 Cal.4th at pp. 446, 449; *State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1245.) Border's original claim fails to meet this requirement. The original claim describes a number of acts by which Border asserts the City breached the agreement beginning immediately after its inception in 1986. The claim itself was presented in June 1995. Nowhere does it provide any information which would inform the City when, during the course of those nine

years, the alleged acts took place. This is not sufficient to allow the City to investigate and evaluate the claim.<sup>10</sup>

Border's contention that it was required only to state the date of execution of the contract because that is the "transaction which gave rise to the claim" (see § 910, subd. (c)), is unavailing for the same reason. To state that a contract was executed in 1986 and was breached at some unspecified time in the next nine years clearly does not satisfy the statute's purpose of giving the public entity sufficient information to allow it to investigate and evaluate the claim.

#### Waiver

In its opposition to the motion for judgment on the pleadings, Border raised the same claims as to waiver, abandonment, estoppel and laches that it now seeks to assert on

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<sup>10</sup> Border asserted in various filings in the trial court that while it is required to plead facts demonstrating compliance or excuse from compliance with the Government Claims Act, it was required to plead only that it presented a timely claim and that the claim was rejected. It asserted that any contention that the claim failed to comply with the claim presentation requirements set forth in section 910, such as the date of occurrence of the incident giving rise to the claim, is a matter of affirmative defense and not grounds for a demurrer. Although Border does not repeat this contention on appeal, we note that it is based on a misreading of *State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th 1234. There, the court held that in a claims act-based case, the plaintiff must plead facts demonstrating or excusing compliance with the Act's claim presentation requirements and that failure to do so may be raised in a general demurrer. (*Id.* at p. 1239.)

Although it is ordinarily not necessary to allege compliance with each and every element of section 910, if the omission of any required element is apparent from the face of the complaint, including any exhibits attached to the complaint (*Frantz v. Blackwell* (1987) 189 Cal.App.3d 91, 94), a demurrer may be sustained. Here, we will assume that the claim was attached to the second amended complaint, just as it was attached to the third amended complaint. Consequently, any patent defect in the claim was a proper subject for demurrer.

appeal. The trial court determined that the single allowable basis for pleading waiver was the premature denial of the claim, and granted Border leave to amend the complaint to allege waiver solely on that ground. Border has forfeited review of its waiver theories and the related theories of laches, estoppel and abandonment, other than premature denial of the claim because it chose to amend the complaint to comply with the court's order granting leave to amend on that limited basis rather than seeking review.

As a general rule, when a demurrer or motion for judgment on the pleadings is sustained with leave to amend, the plaintiff must decide whether to amend the complaint or stand upon the current pleading. If it chooses to amend the complaint, it forfeits review of any alleged error underlying the court's order. (See *Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 966, fn. 2 (*Aubry*).) Border contends, however, that this rule does not apply. It cites *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859 (*Dinuba*). There, the court held that the rule stated in *Aubry* does not apply if the trial court "denied the plaintiff[] leave to include [a] cause[] of action in an amended complaint." (*Id.* at p. 870.)<sup>11</sup> The rule was stated in more detail in *County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th 292: "Upon an appeal pursuant

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<sup>11</sup> Although the court in *Dinuba* does not refer to it, this rule is codified in section 472c of the Code of Civil Procedure. As pertinent, that statute provides, "(b) The following orders shall be deemed open on appeal where an amended pleading is filed after the court's order: [¶] (1) An order sustaining a demurrer to a cause of action within a complaint or cross-complaint where the order did not sustain the demurrer as to the entire complaint or cross-complaint. [¶] . . . [¶] (c) As used in this section, 'open on appeal' means that 'a party aggrieved by an order listed in subdivision (b) may claim the order as error in an appeal from the final judgment.'" (§ 472c, subds. (b)(1), (c).)

to [Code of Civil Procedure section] 904.1 or 904.2, the reviewing court may review the verdict or decision and *any intermediate ruling*, proceeding, order or decision *which involves the merits or necessarily affects the judgment* or order appealed from or which substantially affects the rights of a party’ if the intermediate order was not appealable. (Code Civ. Proc., § 906, italics added.) When a demurrer is sustained with leave to amend, and the plaintiff chooses not to amend but to stand on the complaint, an appeal from the ensuing dismissal order may challenge the validity of the intermediate ruling sustaining the demurrer. [Citation.] On the other hand, where the plaintiff chooses to amend, any error in the sustaining of the demurrer is ordinarily waived. [Citations.] [¶] . . . The rule that a choice to amend waives any error can reasonably be applied only on a *cause-of-action-by-cause-of-action basis*. If a plaintiff chooses not to amend one cause of action but files an amended complaint containing the remaining causes of action or amended versions of the remaining causes of action, no waiver occurs and the plaintiff may challenge the intermediate ruling on the demurrer on an appeal from a subsequent judgment. It is only where the plaintiff amends the cause of action to which the demurrer was sustained that any error is waived.” (*Id.* at p. 312.)

Here, the trial court did not deny leave to amend. Rather, it granted Border leave to amend to allege waiver, but limited it to a particular theory. If Border wished to stand on its prior complaint, including all of its waiver theories, it was required to decline to amend the complaint, allow entry of judgment, and appeal. Because it did not do so, it has forfeited review of the alternate theories barred by the trial court’s order.

We do agree with Border, however, that the trial court's ruling on the premature denial issue is erroneous in part. The trial court held that although the court "gave [Border] leave to amend to allege [the City's] denial of the claim waived the obligation of [Border] to specify a date its claim arose . . . [Border] has failed to do so." We disagree; although the complaint contains surplusage, Border nevertheless alleged waiver by premature denial, and we are unable to see in what respect its allegation is insufficient. However, the trial court also held that because Border suffered no prejudice from the premature denial, the allegation is (or would be) insufficient as a matter of law to support the cause of action. Here, we agree.

Section 910.8 provides that if the public entity determines that a claim "fails to comply substantially with the requirements of Section[] 910 . . . [it] may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. . . . [It] may not take action on the claim for a period of 15 days after the notice is given." Section 911 provides that any defense based on a defect or omission in the claim is "waived by failure to give notice of insufficiency . . . as provided in Section 910.8." The purpose of these "notice and defense-waiver provisions" (*Phillips v. Desert Hospital Dist.* (1989) 49 Cal.3d 699, 701) is to "encourage[] public entities to investigate claims promptly, and to make and notify claimants of their determinations, thus enabling the claimants to perfect their claims." (*Id.* at p. 706.) Because Border alleges that it did amend its claim before the City denied

it, the notice of insufficiency served its statutory purpose of allowing Border to perfect its claim, as the trial court concluded.

Border also contends that the City waived any claim of insufficiency because it failed to issue a notice of insufficiency after it received the amended claims.

The requirement for a notice of insufficiency is triggered by a “claim as presented.” (§ 910.8.) A “claim as presented” is a claim which “is defective in that it fails to comply substantially with Government Code sections 910 and 910.2, but nonetheless puts the public entity on notice that the claimant is attempting to file a valid claim and that litigation will result if it is not paid or otherwise resolved.” (*Westcon Construction Corp. v. County of Sacramento* (2007) 152 Cal.App.4th 183, 202.) Border contends that the letter from attorney Denny, which we discuss below, expressly constituted an addendum to its claim and was itself a claim as presented. Consequently, Border contends, if the City concluded that the claim with the addendum was still not sufficient to permit it to investigate Border’s claims, it was required to give Border a second notice of insufficiency. We disagree. We see nothing in the statutory scheme which requires a public entity to issue repeated notices of insufficiency in order to maintain its right to assert the defect as a defense in subsequent litigation if the claimant fails to correct the defect after receiving the first notice of insufficiency.

### The Amended Claim

Border contends that the third amended complaint alleges that Border amended its Government Code claim in such a way that it substantially complied with the claims act. We agree that Border adequately alleged substantial compliance.

In its third amended complaint, Border alleged that after the City notified Border that its Government Code claim was deficient because it failed to state the date of the occurrence, Border's attorney, Christopher Denny, met with the City's representatives to discuss the alleged insufficiency of the claim and possible settlement of the claim. At the meeting, which took place on July 19, 1995, the issue of the "date of incident" was discussed. Border's representative, Roque De La Fuente, "explained that the breaches by the City were ongoing, but to satisfy the City's request for a specific 'date of incident,' wrote January 1, 1995[,] on the claim form and gave it to the City during that meeting." The complaint alleged that "all present" were satisfied by this additional information and that the City never thereafter suggested that anything else remained for Border to do in order to fully comply with the Government Claims Act. Border attached a copy of a letter from Harold O. Valderhaug, the City's chief deputy city attorney, referencing the meeting and confirming some of the items discussed.

Where a claim alleges ongoing injuries, it may substantially comply with the claims act if it states a date on which the injuries began or a sufficiently narrow period within which the injuries occurred to enable the public entity to investigate the claim and/or take action to avert any continuation of the injury. (*Knight v. City of Los Angeles*

(1945) 26 Cal.2d 764, 766-767.) Border alleged that at the meeting on July 19, 1995, it told the City's representatives that the ongoing breaches began in January 1995.

Attachment A to the original claim sets forth in detail the acts Border asserted to be breaches of the agreement. Seven months is a sufficiently narrow time frame to permit the city to investigate Border's claims. Moreover, Valderhaug's letter, which was attached to the complaint as an exhibit, makes it clear that the City did have sufficient information to investigate Border's allegation.<sup>12</sup> In his letter, dated September 22, 1995, and addressed to Roque De La Fuente, Valderhaug reiterated the concerns De La Fuente expressed during the July 19 meeting. Valderhaug described in detail the actions the City took to investigate Border's complaints, as discussed in the meeting. He stated that he was able to investigate several of the complaints and had determined that they were unfounded for reasons which he described in detail. He stated that the City was continuing to look into other complaints and suggested that one or more additional meetings might help resolve the outstanding issues. Taken all together, the original claim, the additional information provided at the meeting that Border claimed that the breaches began on January 1, 1995, and the other information provided to the City at the

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<sup>12</sup> As we have previously noted, evidentiary facts found in attachments to a complaint may be considered on demurrer. (*Frantz v. Blackwell*, *supra*, 189 Cal.App.3d at p. 94.)

July 19 meeting, as reflected in Valderhaug’s letter, sufficed to provide the City with sufficient information to allow it to investigate Border’s claims.<sup>13, 14</sup>

The claims presentation statutes are to be given a liberal interpretation to permit full adjudication on the merits, so long as the policies underlying the statutes are satisfied. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority, supra*, 34 Cal.4th at p. 449.) The fundamental purpose of the statutes is to provide the public entity with sufficient information to enable it to investigate the claim. Consequently, the claim need only “‘fairly describe what [the] entity is alleged to have done.’ [Citations.]” (*Id.* at p. 446.) The third amended complaint adequately alleges that Border provided the City with sufficient information to investigate its claim. This satisfies the purpose of the claims presentation statutes and constitutes substantial compliance with the date

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<sup>13</sup> The City contends that Border’s failure to produce a copy of the claim with “January 1, 1995” inscribed upon it, along with the declaration of a city employee stating that no such inscribed claim exists in the city’s files, is fatal to a finding of substantial compliance. We disagree. The issue is whether Border informed the City that January 1, 1995, was the start date for purposes of the claim, not whether that date was inscribed on the original claim. Border alleged that it did so inform the City’s representatives at the meeting. This allegation is supported by the City’s use of that date in its letter rejecting the claim.

<sup>14</sup> Other correspondence between Denny and the City, which Border provided in its opposition to the demurrer, adds further details as to what information Border provided to the City. As Border points out, in determining whether the trial court abused its discretion by denying leave to amend, we could consider this correspondence “as an indication of the facts the [plaintiff] would have alleged had it been granted leave to amend the complaint.” (*Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 940 [Fourth Dist., Div. Two].) That consideration is unnecessary, in light of our conclusion that the demurrer should not have been sustained at all.

requirement. (*State of California v. Superior Court (Bodde)*, *supra*, 32 Cal.4th at p. 1245.) Accordingly, the demurrer was improperly sustained.<sup>15</sup>

The City contends that the meeting and correspondence between it and Border are not sufficient to constitute substantial compliance with section 910. It contends that case law holds that compliance requires a “single document” which constitutes the claim, and that because the public entity’s actual knowledge of the facts underlying the claim are not a substitute for compliance, the public entity’s own documents—i.e., Valderhaug’s letter—cannot be used to demonstrate substantial compliance. We disagree.

The City cites *Dilts v. Cantua Elementary School Dist.* (1987) 189 Cal.App.3d 27 (*Dilts*) and *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524 (Fourth Dist., Div. Two) (*Schaefer Dixon*). Both cases do hold that substantial compliance with the claims act requires a single document which is intended to constitute a claim. However, in both cases, the purported claims consisted of a series of letters from the plaintiff’s attorney, none of which conveyed a warning that a dispute existed which would result in litigation unless settled. (*Dilts*, at pp. 37-38; *Schaefer*

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<sup>15</sup> The City states several times in its briefing that the allegations of the third amended complaint exceed the scope of the trial court’s order because Border did not limit its amendments to allege only waiver based on the City’s premature denial of the claim. It does not actually assert it as a basis for affirming the judgment, however. Nevertheless, it bears mentioning that the trial court’s order granting leave to amend “only” to allege waiver based on the City’s premature denial of the claim reflects the court’s conclusion that Border’s other theories of *waiver* (and its related contentions of abandonment, laches and estoppel) failed as a matter of law and that only the premature denial theory of waiver was arguably valid. The order did not preclude Border from amending the complaint to allege new or different facts demonstrating *compliance* with the claims act as an alternative to waiver.

*Dixon*, at pp. 533-534.) (As noted above, *Phillips v. Desert Hospital Dist.*, *supra*, 49 Cal.3d 699, provides that in order to constitute a claim as presented, a document must “disclose[] the existence of a ‘claim’ which, if not satisfactorily resolved, will result in a lawsuit” against the public entity. (*Id.* at p. 709.)) In neither case was there a document which explicitly stated that it was a claim or which indicated that it was intended to constitute a claim. The courts held that to find substantial compliance on the basis of a series of letters, rather than a single document which at least constituted a claim as presented, would be unworkable:

“[A] construction of the law as urged by Dilts does not withstand scrutiny. As noted previously, the often-cited purpose of the claims act is to enable the public entity to make an adequate investigation of the merits of the claim and to settle the claim without the expense of litigation. [Citation.] However, there are other practical considerations in determining whether or not the purposes of the act are being served. The established procedure for the filing of claims pursuant to the Tort Claims Act would become totally unworkable if this court were to hold that a series of writings could collectively be considered a claim.

“If a series of letters received over a period of time could collectively constitute a claim, it would be impossible to ascertain whether a claim had been presented within the 100 days or one-year time limitation as specified in section 911.2. The act provides that if a claimant files a timely claim, the public entity has 45 days within which to grant or deny the claim. (§ 911.6.) If the claim is denied by way of written notice, the claimant

has six months within which to file a court action. (§ 913.) If the claim is not acted upon by the public agency within 45 days, it is deemed denied by operation of law and the claimant has 2 years within which to file a court action. (§ 945.6.) It would be difficult for the public entity to identify whether a particular letter were a claim and which letter triggered its obligation to accept or deny a claim if a series of correspondence could be considered collectively to constitute a claim. If an agency was unable to determine whether a claim had been filed or when the claim had been filed, it would be equally difficult for the court to determine which statute of limitation applied or when the statute of limitation began to run.

“The procedures prescribed by the Tort Claims Act envisioned the filing of a single claim with the public entity so that the public entity may investigate the claim, consider settlement and formally approve or reject a claim. The letters sent to the district on behalf of Dilts by his attorney do not constitute a claim within the meaning of the Tort Claims Act, and the doctrine of substantial compliance cannot be applied.” (*Dilts*, at pp. 35-36; accord, *Schaefer Dixon*, at pp. 535-536.)

Here, in contrast, Border *did* file a single document which clearly conveyed that it was intended to constitute a Government Code claim. Indeed, it used the City’s own claim form. The issue before us is therefore not whether the subsequent correspondence could be a *substitute* for such a form. Rather, the issue is whether the claim form, together with the subsequent correspondence and the discussions between Border and the

City demonstrate substantial compliance. For the reasons stated above, we conclude that they did.

The City also contends that Border has made judicial admissions that the breaches, or some of them, actually occurred before January 1, 1995, and that the demurrer was properly sustained on that basis. But as we discuss below, it is law of the case that the breaches as to which retrial has been ordered occurred within one year before the date the claim was presented. That finding is binding on this court and on the trial court.

#### The City's Contentions Lack Merit

In addition to contending that the claim lacks the required date, that no amendment by Border cured the defect and that it did not waive any defect in the claim, the City also argues that the statute of limitations bars the complaint, that the allegations of the third amended complaint “fatally vary” from the allegations of the Government Code claim, and that res judicata bars the complaint. We reject these contentions.

#### Statute of Limitations

The City asserts a number of reasons that the breach of contract cause of action is entirely barred by the statute of limitations. None of them is cognizable in this appeal, however, because it is law of the case that certain of Border's allegations of breach of contract are *not* time-barred.

At the conclusion of the trial, the City filed a motion for judgment notwithstanding the verdict (JNOV), arguing, among other things, that because Border did not submit its government claim until June 23, 1995, any breach of contract claim which accrued before

June 23, 1994 is time-barred. The trial court agreed. However, it found that Border's claims for damages based on several breaches of the agreement were not time-barred. It denied the JNOV motion, but it granted, in part, the City's motion for new trial. In granting that motion, the court stated:

“With respect to the verdict for breach of contract [], the court has decided in connection with the JNOV motion that the statute of limitations barred recovery of all damages for breach of contract that accrued prior to June 23, 1994. Because the verdict was essentially a general verdict, it is impossible to determine which breaches the jury found as a basis of liability, and what amount of damage was attributed to each breach. It is clear, however, that evidence was presented of breach of contract damages accruing before the statutory bar date. It clearly appears, then, that the damages are excessive as a matter of law, and because it is impossible to separate the proper from the improper award of damages, or to know which breach was considered by the jury in making its award, the court must grant a new trial on the cause of action for breach of the Development Agreement, both as to liability and damages.

“For the above reasons, and the additional reasons set forth in the court's ruling on the motion for judgment notwithstanding the verdict in connection with the statute of limitations issue, the court GRANTS defendants [*sic*] motion for new trial, limited, however[,] to a new trial on the cause of action for breach of the Development Agreement. The court grants this motion on the grounds set forth in section 657(5) and (7) of the Code of Civil Procedure in that an error of law occurred, excepted to by the

defense, in the court’s ruling that the statute of limitations on the breach of contract action had not commenced to run. This ruling led to an erroneous admission of evidence of damage occurring before the statutory bar date resulting in an award of excessive damages on the breach of contract claim.”

As noted above, the City appealed from the judgment on the inverse condemnation cause of action and Border cross-appealed on the order granting a new trial. The City did not appeal the denial of the JNOV motion. We affirmed the new trial order. (*Border v. San Diego, supra*, 142 Cal.App.4th at pp. 1560-1566, 1567.) When an appellate court states in its opinion a principle or rule of law necessary to its decision, that principle or rule becomes the law of the case and must be adhered to throughout the remainder of the case, both in the trial court and on any subsequent appeal. (*People v. Barragan, supra*, 32 Cal.4th at p. 246.) Per this court’s affirmance of the order for new trial, it is law of the case that the statute of limitations bars certain of Border’s claims for damages resulting from breach of the agreement, but that it does not bar others. Consequently, the City may not now assert, on the same grounds or on different grounds, that the statute of limitations bars the breach of contract cause of action in its entirety.

#### *Variance Between the Claim and the Complaint*

The facts underlying any cause of action for which a Government Code claim is required must be “fairly reflected” in the claim. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority, supra*, 34 Cal.4th at p. 447.) The complaint may

not ““premise civil liability on acts or omissions committed at different times or by different persons than those described in the claim’ . . . . [Citation.]” (*Ibid.*)

The City contends that the allegations of the third amended complaint vary fatally from Border’s Government Code claim. However, its sole contention as to variance is that the complaint alleges breaches of the agreement which postdate the claim. That contention is merely a variation on the City’s statute of limitations argument, and it, too, is barred by the doctrine of law of the case, because the trial court’s ruling on the new trial motion limits the new trial to breaches which occurred during the statutory limitation period, i.e., one year prior to the presentation of the claim. (*Border v. San Diego, supra*, 142 Cal.App.4th at p. 1562, fn. 20.) Border could have amended its complaint to reflect that limitation, but in light of the ruling in the first appeal, its failure to do so does not render the complaint demurrable on that basis.

#### *Res Judicata*

The City contends that because this case, *National Enterprises, Inc. v. City of San Diego*, and *Otay Acquisitions LLC v. City of San Diego* (see fn. 1, *ante*) involve the same plaintiffs, based on its contention that the trial court found them all to be alter egos of one another, “final judgment for the City in any one of the lawsuits will erect a res judicata bar to the other two lawsuits.” However, because we are reversing the judgments in all three cases, there is no final judgment which can have a preclusive effect.

THE FINAL JUDGMENT MUST INCLUDE THE JUDGMENT IN FAVOR OF  
BORDER ON THE CITY’S CROSS-COMPLAINT

After the court sustained the demurrer without leave to amend, Border submitted a proposed judgment. In it, Border recited a number of facts pertaining to the trial court’s resolution of the City’s cross-complaint. It noted that the trial court directed a verdict in favor of Border on the City’s cause of action for fraud and that on the causes of action submitted to it, the jury found that (1) the City suffered no damage as a result of Border’s default on a promissory note; (2) Border did not breach the development agreement; and (3) Border did not engage in unfair business practices. Border attached a copy of the original judgment to the proposed judgment.

The proposed judgment then recites the history of the case through the first appeal. It notes that this court did not reverse the judgment in Border’s favor on the City’s cross-complaint. It then states that “it is ordered and adjudged” that Border take nothing on its complaint and that the City take nothing on its cross-complaint.

The City objected to the proposed judgment, stating that the earlier judgment had been “wholly rejected and reversed by the Court of Appeal” and that the City had recently voluntarily filed a request to dismiss its cross-complaint without prejudice. The court signed Border’s proposed judgment after crossing out portions which refer to the cross-complaint, including the portion stating that the City shall take nothing on its cross-complaint.

Border now contends that the judgment should include the judgment it obtained on the City's cross-complaint for breach of contract, fraud and unfair business practices. The City contends that because it obtained a reversal of "the entire judgment" on appeal, there is no judgment which can be entered on its cross-complaint. This is incorrect.

Where a party challenges only a portion of a judgment—whether by filing a notice of appeal only as to part of a judgment or by raising issues in its briefing which pertain to only a part of the judgment—reversal of the entire judgment is required only if the portion of the judgment not challenged on appeal is "so intimately connected with the part appealed from that a reversal of that part would require a reconsideration of the whole case in the court below." (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 805.) Otherwise, the judgment is severable, and reversal of one portion does not necessitate reversal of any other portion. (*Id.* at pp. 805-806.)

In the first appeal, the City did not raise any issues pertaining to its cross-complaint. It sought only a reversal of the judgment on the inverse condemnation cause of action. (*Border v. San Diego, supra*, 142 Cal.App.4th at pp. 1543-1544.) It contends, however, that because the cross-complaint was based on same "nucleus of fact" as the inverse condemnation claim, the judgment is not severable and reversal is required as to the entire judgment.

That a complaint and cross-complaint arise from the same transaction and are thus based on the same "nucleus of fact" is not sufficient to show that the issues raised in each are so intertwined that the determination of one affects the determination of the other.

(*Gonzales v. R.J. Novick Constr. Co.*, *supra*, 20 Cal.3d at pp. 805-806.) In any event, the City has forfeited this contention by failing to raise it in the prior appeal. In *Border v. San Diego*, *supra*, 142 Cal.App.4th 1538, we expressly reversed only the judgment on the inverse condemnation cause of action; we did not mention the cross-complaint in the disposition. (*Id.* at p. 1567.) The City did not file a petition for rehearing to seek clarification that the reversal included the judgment on the cross-complaint. That appeal is final, and the City cannot now contend that the reversal should have included the judgment on the cross-complaint.

Although we are reversing the judgment and remanding the cause for further proceedings, this issue is not moot because it will arise again when judgment is again entered. Just as the final judgment must reflect entry of judgment for the City on Border's complaint for inverse condemnation as directed in *Border v. San Diego*, *supra*, 142 Cal.App.4th at page 1567, it must also reflect entry of judgment for Border on the City's cross-complaint.

#### REQUESTS FOR JUDICIAL NOTICE

The parties' requests for judicial notice are denied.

DISPOSITION

The judgment is reversed, including the judgment for attorney fees. Border Business Park, Inc. is awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKinster  
Acting P.J.

We concur:

/s/ Richli  
J.

/s/ King  
J.